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IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1996

GORDON NURSE,
Petitioner,

v.

UNITED AIR LINES, INC.,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH OTHER CIRCUITS OF THE UNITED STATES COURT OF APPEALS ON THE SAME IMPORTANT MATTER, TO WIT, IN AFFIRMING SUMMARY JUDGMENT IN FAVOR OF AN EMPLOYER WHEN SUPERVISORS AND MANAGEMENT HAVE MADE DIRECT COMMENTS INDICATING DISCRIMINATORY INTENT ON THE ISSUE OF AGE DISCRIMINATION?

2. WHETHER THE NINTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH OTHER CIRCUITS OF THE UNITED STATES COURT OF APPEALS ON THE SAME IMPORTANT MATTER, TO WIT, IN AFFIRMING SUMMARY JUDGMENT WHEN THE LOWER COURT FAILED TO GRANT A CONTINUANCE TO PERMIT PLAINTIFF TO MOVE TO COMPEL DISCOVERY AFTER PLAINTIFF HAD BEEN DENIED ACCESS TO POTENTIALLY FAVORABLE INFORMATION?

3. WHETHER THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH CONFLICTS WITH RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT, TO WIT, IN FAILING TO ACKNOWLEDGE A CIRCUMSTANTIAL INFERENCE OF AGE DISCRIMINATION SUFFICIENT TO PRECLUDE SUMMARY JUDGMENT IN DIRECT CONTRAVENTION OF O'CONNOR V. CONSOLIDATED COIN CATERS, — U.S. — (1996) AND FURNCO CONSTRUCTION CO. V. WATERS, 438 U.S. 562 (1978).

LISTING OF PARTIES TO PROCEEDINGS BELOW

The caption reflects all the parties to the proceedings.

STATEMENT REQUIRED BY RULE 29.6

United Airlines has no parent companies and no non-wholly owned subsidiaries.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, Gordon Nurse respectfully prays that a writ of certiorari issue to review the unpublished opinion of the United States Court of Appeals for the Ninth Circuit, affirming the decision of the United States District Court for the Northern District of California.

JURISDICTION

The Order of the Ninth Circuit sought to be reviewed was issued on February 24, 1997 (see Appendix "B"). The date of the order denying rehearing is April 18, 1997 (See Appendix "C"). Jurisdiction for United States Supreme Court review is based upon 28 U.S.C. 1254. Jurisdiction in the District Court is based upon 28 U.S.C. 1441 (removal) and 28 U.S.C. 1331 and 1332 (federal question and diversity).

The statute involved in this case relative to disability discrimination is California Government Code section 12940 (a) (1) and (2), which provides:

> "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of California:
>
> (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex or any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the

person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

(1) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health and safety of others even with reasonable accommodations.

(2) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with the reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee's health

and safety or the health or safety of others even with reasonable accommodations."

The statute in this case relative to age discrimination is California Government Code section 12941 which provides:

> "(a) It is unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action. This section shall not be construed to make unlawful the rejection or termination of employment where the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held, or to require any changes in any bona fide retirement or pension programs or existing collective-bargaining agreements during the life of the contract, or until January 1, 1980, whichever occurs first, nor shall this section preclude such physical and medical examinations of applicants and employees as an employer may make or have made to determine fitness for the job or position sought or held.
>
> Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, and trade schools shall not, in and from themselves, constitute a violation of this section.
>
> (b) This section shall not limit the right of an employer, employment agency, or labor union to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or persons claiming that the violation occurred."

STATEMENT OF THE CASE

On September 14, 1994, Petitioner Nurse filed a complaint for disability and age discrimination against United Air Lines ("UAL") in the San Francisco County Superior Court (Complaint pp. 1-6; See Appendix D). Nurse asserted he was discriminated against on the basis of his age. (Appendix D at p. 4). On October 31, 1994, UAL filed a Notice of Removal of Action Under 28 U.S.C. section 1441 (a) and (b) (A). (See Appendix E). On November 4, 1994, UAL filed its answer to Nurse's complaint. (See Appendix F).

UAL then filed Motion for Summary Judgment with appropriate notice and supporting papers. Nurse filed his Opposition and supporting papers. Nurse requested an extension of time to oppose the Motion for Summary Judgment in order to Compel response by UAL to outstanding discovery requests. (Opposition to Summary Judgment p. 18; see Appendix G). UAL replied with supporting papers. UAL also filed Objections to Nurse's evidence. On February 8, 1996, the lower court ruled that summary judgment be granted in favor of UAL and against Nurse. (See Appendix A). On March 4, 1996, Nurse timely filed Notice of Appeal.

By Order (Appendix A), the District Court granted summary judgment in favor of UAL. Timely appeal followed to the Ninth Circuit which affirmed the grant of summary judgment (See Appendix B), and denied request for rehearing with suggestion for rehearing *en banc*. (See Appendix C).

STATEMENT OF FACTS

At the time summary judgment was considered, Nurse was a 68-year-old aviation mechanic who worked for UAL for 26 years. Nurse first received Workers' Compensation disability leave in February 1981 because of a work-related knee injury.

He returned to work in September of that year. Nurse worked as a qualified lead mechanic from 1984 until 1990.

On September 18, 1990, Nurse underwent surgery on both knees, collecting Workers' Compensation disability payments for the period of time surrounding his surgery.

On May 23, 1991, Nurse's doctor, Dr. Chronister, wrote UAL's Medical Department a detailed letter delineating Nurse's work restrictions upon his return. Nurse returned to work on August 19, 1991. Upon Nurse's return, his then supervisor, Mr. Quam, informed him that he would prefer that Nurse retire.

On August 7, 1992, Nurse filed a grievance with his supervisor, Peter Corallo ("Corallo"). After filing the grievance, Nurse was ostensibly given the opportunity to become a temporary lead. From August 1992 until January 1993, Nurse trained for the temporary lead mechanic position. Corallo made it more difficult for him than other trainees to qualify as a temporary lead mechanic by requiring him alone to demonstrate proficiency in all four training areas. Additionally, Nurse was not given an available light duty position which was given to someone with less seniority. While there is no pre-established period of time required to qualify for a lead position, Nurse failed to qualify in six months, despite his prior lead mechanic experience, even though lead mechanics typically qualify in less than three months. Finally, in the summer of 1992, while Corallo was training Nurse, Corallo was constantly asking Nurse when will he be retiring and Corallo arranged for an unsolicited retirement package to be sent to Nurse.

In January 1993, Nurse again began to experience knee problems. On February 1, 1993, Nurse went out on Workers' Compensation disability leave, from which he has yet to return. Nurse filed a Workers' Compensation claim for his February 1993 injuries. Based in the reports of two Qualified Medical Examiners, Nurse was found to be a Qualified Injured Worker under the Workers' Compensation Act. During February and March, Nurse used up his remaining entitlements to

occupational leave, vacation, and non-occupational leave. On April 11, 1993, Nurse was placed on Extended Illness Status pursuant to his union contract. This is still Nurse's present status at UAL. On April 22, 1993, Nurse underwent another operation on this left knee and on January 6, 1994, he had surgery on his right knee.

On December 17, 1993, Nicholas Hyland (Personnel) told Nurse "that [Hyland's] office was bombarded by people retiring and [Nurse] should do the same." Nurse also alleges that other "people had told him he was too old to work."

On January 4, 1994, Nurse filed a complaint with the California Department of Fair Employment and Housing ("DFEH") alleging *inter alia* discrimination due to disability and age in order to force Plaintiff to retire. As of February 3, 1993, Plaintiff had failed to qualify as a temporary lead worker, a job Plaintiff could do, and instead Plaintiff was placed in a much more demanding job.

The District Court made reference to the following "direct evidence" statements of UAL "suggesting retirement" after return from disability leave, the conversation between Nurse and Corallo [Nurse's supervisor] where "retirement plans" were discussed, and the "alleged" [disputed] suggestion made by Hyland and his secretary that Nurse retire.

ARGUMENT

Firstly, a conflict in the Circuits is present on the important issue of whether direct statements of age discrimination are sufficient to preclude summary judgment. Nurse was the subject of a plethora of direct statements that he should retire or that he was too old. Nurse's supervisor Quam informed him that he would prefer that Nurse retire. Nurse's training supervisor Corallo was constantly asking Nurse when he would retire and

Corallo arranged for an unsolicited retirement package. Nurse was informed by Hyland's office [personnel] that he should retire. Nurse was also told by others at UAL that he was too old to work. In affirming summary judgment, the Ninth Circuit ratifies the conclusion that this evidence is not direct evidence of age discrimination, and, in so doing, ignores the conclusions reached in the Seventh and Third Circuits. *See Shager v. Upjohn Co.,* 913 F.2d 398, 402-403 (7th Cir 1990); *Siegel v. Alpha Wire Corp.,* 894 F.2d, 50, 55 (3d Cir 1990).

Secondly, a conflict between the Ninth Circuit and Second Circuit is present on the important issue of whether a continuance to oppose summary judgment should be granted to permit completion of discovery. The Ninth Circuit's affirmance of the lower court grant of summary judgment when a plaintiff reasonably requests discovery of potentially favorable information is in direct conflict with the Second Circuit. *See Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 445 (2d Cir 1980).

Thirdly, the Ninth Circuit has decided an important question of federal law, whether an inference of discrimination precludes summary judgment in a way which conflicts with both *O'Connor* and *Furnco.* Among other palpable indicia of discriminatory adverse action, Nurse was not given a light duty position an da less senior employee was. This circumstance alone is functionally very similar to the facts of *O'Connor v. Consolidated Coin Caterers,* — U.S. --, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). In *O'Connor,* an employee who was in the protected class was at issue. Here, a less senior employee was given a position Nurse could reasonably expect. *O'Connor* makes clear that age discrimination cases only require evidence adequate to create an inference that an employment decision was based upon an illegal criterion. (Slip Opinion p. 5) To the extent the Ninth Circuit found that Nurse's case was not actionable because it did not fit the rubric outlined by *McDonnell-Douglas v. Green,* 411 U.S. 792 (1973), this

conclusion is in conflict with *Furnco Construction Co. v. Waters*, 438 U.S. 562, 567 (1978).

The gravamen of Nurse's claim is that the pattern of activities perpetrated by UAL has the ineluctable effect of constituting *de facto* retirement. That some of UAL's activities vis a vis Nurse are clothed in a "sheep's clothing" of activities ostensibly permitted by Workers' Compensation law merely gives those activities the patina of legality and regularity but does not make them non-actionable. The inquiry concerning whether sufficient circumstantial inferential evidence exists does not end with the suggestion that Nurse has been properly a part of the Workers' Compensation process.

Fundamentally, Nurse has presented evidence which shows that UAL's conduct *en toto*, including its ostensibly lawful Workers' Compensation activities, is simply an artifice to accomplish an illegal purpose. In determining that Nurse has suffered no "actual employment discrimination" the Ninth Circuit assumes its own conclusion that no adverse consequences have befallen Nurse. The evidence of record shows that UAL made it more difficult for Nurse to qualify as lead mechanic, that UAL failed to place Nurse in a light duty position while giving that position to a less senior employee, and that Nurse, because of his Qualified Injured Worker ("QIW") status, was forced to use all available leave. Nurse found himself in circumstances tantamount to forced retirement. That this forced retirement ended with an ostensibly valid Workers' Compensation finding that Nurse was QIW does not cleanse the failure by UAL to place Nurse in an appropriate light duty position *ab initio*.

Viewing the evidence in a light most favorable to Nurse, a strong inference is present creating a genuine issue of material fact on the issue of whether the entire process was a premeditated monolithic effort by UAL to force Nurse to retire. It is easy to conclude that UAL contemplated this predictable outcome: that Nurse is effectively "put out to pasture". It is a

hoary maxim of the common law that one is responsible for the foreseeable consequences of one's acts or omissions.

Nurse has suffered harm as the result of employment discrimination. Nurse was not given a light duty position when *inter alia* he had inherent reason to believe he would be given an appropriate position as part and parcel of the Vocational Rehabilitation process. Further evidence of record shows that Nurse was not treated fairly in regard to his evaluations as a lead mechanic and/or not given proper accommodation given his condition. UAL has not made even a scintilla of a showing that Nurse was unable to do the work or that any bona fide occupational requirement of that position precluded Nurse from doing the work. As such, not only was Nurse harmed by UAL's conduct, the inexorable conclusion is that UAL's conduct was impermissibly motivated by Nurse's age and for no other reason.

That the pattern of activities visited upon Nurse by UAL does not exactly fit the niche carved out by *McDonnell Douglas* is not a basis for denying Nurse his day in court. That Nurse concedes that the four-prong test of *McDonnell Douglas* does not fit his circumstances exactly because he was not "rejected" per se nor was there, strictly speaking, a position which "remained open", does not constitute an admission by Nurse that he was not the subject of pernicious and pervasive discriminatory conduct by UAL. It cannot be gainsaid that Nurse was treated disparately, He was not given light duty. He was evaluated unfairly in the lead mechanic position and treated differently in other material respects. That Nurse, in good faith, entered the Workers' Compensation process in an effort to resolve the issue of his proper position at UAL cannot be a basis for finding that UAL's conduct in leading up to his entry into the Vocational Rehabilitation Process was either lawful or benign. The *McDonnell Douglas* model was never intended to be rigid, mechanistic or ritualistic. *Furnco Construction Co. v. Waters,* 438 U.S. 562, 567 (1978).

It must be underscored that the object of the exercise in

opposing summary judgment is *not* for Nurse to rebut the evidence which UAL presents in support of its theory of the case but rather, in presenting the evidence which supports Nurse's theory of the case, to show that there exist(s) palpable genuine issues of material fact which require that this matter be tried. The pitfall that Defendants' theory of the case be the logical context in which these issues are viewed must be avoided. That UAL presented its evidence first for purposes of its motion for summary judgment cannot serve to deprive Nurse of his theory of the case. Since Nurse presented a plethora of admissible evidence which shows genuine issues, summary judgment was inappropriate.

In reviewing the adjudication of motions for summary judgment, it must be underscored that discrimination cases are inherently cases of circumstantial evidence from which an inference of discriminatory intent is drawn. The inference is one of induction; deductive or logical certainty is not required. The substantial evidence required to show genuine issues in the context of cases of discrimination are those bits of admissible evidence which show the inference that a dispute exists. To deny summary judgment, the court need not determine how the issue would be resolved, only that the possibility of inference of discrimination from the evidence exists. In this vein, the Ninth Circuit is in conflict with the *raison d'etre* of *O'Connor.*

CONCLUSION

Since Nurse was the subject of employment discrimination, since Supreme Court case law militates the conclusion that both direct and circumstantial evidence preclude summary judgment, since UAL's actionable conduct need not fall into any pre-existing paradigm *per se*, since Nurse was not permitted full and fair discovery and was thereby denied due process, and since

desirable uniformity on important issues is lacking among the Circuits and between the Ninth Circuit and the Supreme Court, Nurse respectfully requests that his Petition for Writ of Certiorari be granted.

DATED: 9/20/91

Respectfully submitted,

Carlos M. Alcala

CARLOS M. ALCALA

APPENDICES

APPENDIX A

[Filed 2-8 1996]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 94-3774 SC

Gordon Nurse,
Plaintiff

vs.

United Air Lines,
Defendant.

SUMMARY JUDGMENT

I. INTRODUCTION

Defendant, United Air Lines, Inc. ("United"), brings this summary judgment motion against plaintiff, Gordon Nurse ("Nurse"), alleging that Nurse's claim for disability discrimination is preempted by the California Workers' Compensation Act, Cal. Labor Code §§ 132a and 3600-3602. United further argues that to the extent its actions are not preempted, they do not constitute unlawful age discrimination in violation of the Fair Employment and Housing Act ("FEHA"), Cal. Govt Code § 12940 *et seq*.

II. LEGAL STANDARD

Summary judgment is proper only when there is no genuine issue of material fact and, when viewing the evidence in the light most favorable to the non-moving party, the

movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. 317 (1986). In addition, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment. *California Architectural Building Products, Inc., v. Franciscan Ceramics, Inc.*, 838 F.2d 1466, 1468, (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

Bearing in mind that the evidence should be viewed in the light most favorable to Nurse, as the non-moving party, the relevant facts are summarized below.[1]

---

[1]The court takes notice of both plaintiff's and defendant's objections to evidence submitted in support of and opposition to defendant's summary judgment motion. The court has evaluated both plaintiff's and defendant's objections and considered only evidence to which either no objection was lodged or the objection was overruled. Where appropriate, however, the court will comment on the admissiblity of certain evidence considered for this motion.

III. FACTS AND BACKGROUND

Nurse is a sixty-eight year old aviation mechanic who has worked for United for twenty-six years.

Nurse first received Workers' Compensation disability leave in February 1981 because of a work-related knee injury. He returned to work in September of that year. Nurse worked as a qualified lead mechanic from 1984 until 1990. He then filed an EEOC charge when his temporary lead credential was taken away from him in 1990.

On September 18, 1990, Nurse underwent surgery on both knees, collecting Workers' Compensation disability payments for the period of time surrounding his surgery.

On May 23, 1991, Nurse's doctor, Dr. Chronister, wrote United's Medical Department a detailed letter delineating Nurse'[s] work restrictions upon his return. Nurse returned to work on August 19, 1991. Nurse contends that upon his return, his then supervisor, Mr. Quam, informed him that he would prefer that Nurse retire.

On August 7, 1992, Nurse filed a grievance with his supervisor, Peter Corallo ("Corallo"). After filing the grievance, Nurse was given the opportunity to become a temporary lead qualified. From August 1992 until January 1993, Nurse trained for the temporary lead mechanic position. Nurse contends that Corallo made it more difficult for him than other trainees to qualify as a temporary lead mechanic by requiring him alone to demonstrate proficiency in all four training areas.[2] In addition, Nurse contends that while there is no pre-established period of time required to qualify in six

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[2]Nurse claims that he was required to show proficiency in the balance area, the sub assembly areas of the N1 and N2 modules, the assembly of turbine midframes, rear frames, stator cases, and rotors, and the core area. Nurse contends that none of the permanently qualified leads of each department are required to possess such proficiency in all four areas.

months, despite his prior lead mechanic experience, even though lead mechanics typically qualify in less than three months. Finally, Nurse claims that in the summer of 1992, while Corallo was training Nurse, Corallo was constantly asking Nurse when will he be retiring and Corallo arranged for an unsolicited retirement package to be sent to Nurse.

In January 1993, Nurse again began to experience knee problems. On February 1, 1993 Nurse went out on Worker's Compensation disability leave, from which he has yet to return.

Nurse filed a Workers' Compensation claim for his February 1993 injuries. Based on the reports of two Qualified Medical Examiners, Nurse was found to be a Qualified Injured Worker under the Workers' Compensation Act. During February and March, Nurse used up his remaining entitlements to occupational leave, vacation, and non-occupational leave. On April 11, 1993, Nurse was placed on Extended Illness Status pursuant to his union contract. This is still Nurse's present status at United. On April 22, 1993, Nurse underwent another operation on his left knee and on January 6, 1994, he had surgery on his right knee.

Nurse claims that on December 17, 1993, Nicholas Hyland ("Hyland"), Nurse's supervisor, and Hyland's secretary both told him "that [Hyland's] office was bombarded by people retiring and [Nurse] should do the same." Nurse also alleges that other "people had told him he was too old to work," without specifically identifying those other people or the circumstances under which those statements were made.

On January 4, 1994, Nurse filed a complaint with the California Department of Fair Employment and Housing ("DFEH") alleging harassment, retaliation, and the denial of promotion, transfer, and accommodation. Nurse's complaint alleges that "on January 20, 1993 and continuing he was

denied reasonable accommodation for a knew [sic] disability." It further alleges that "[t]his was done in order to discriminate against plaintiff due to disability and age in order to force plaintiff to retire. As of February 3, 1993, plaintiff had failed to qualify as a temporary lead worker, a job plaintiff could do and instead plaintiff was placed in a much more demanding job."

IV. DISCUSSION

A. Workers' Compensation Act Preemption

Nurse's disability discrimination claim is barred by the exclusive remedy provisions of the Workers' Compensation Act. Cal. Labor Code §§ 132a and 3600-3602; *Langridge v. Oakland Unified School Dist.* 25 Cal. App. 4th 664, 670 (1994); *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1530 (9th Cir. 1995) (The California workers' compensation provisions provide the exclusive remedy under California law for a work-related physical disability discrimination claim.) Nurse concedes that his disability discrimination claim is based on a disability that arose from a work-related injury. However, Nurse counters that his claim is not barred by the Workers' Compensation Act as the alleged discrimination took place prior to his 1993 disability leave. The original work-related injury for which Nurse received workers' compensation took place in 1990. The entirety of Nurse's disability discrimination claim is based on discriminatory acts arising from his work-related injuries and consequent special job requirements. Workers' compensation provides the exclusive remedy for this type of discrimination regardless of when Nurse actually went on disability leave. Accordingly, Nurse's disability discrimination claim is barred by the exclusive remedy of the Workers' Compensation Act.

B. The DFEH Claims

Nurse alleges that his complaint implicitly contains the harassment and retaliation claims that were included in the

charge filed with the DFEH. United asserts that these claims were not explicitly stated in his complaint and thus, are not actionable.

Nurse's complaint does not include the harassment and retaliation claims that were included in the charge filed with the DFEH. On January 4, 1994, Nurse filed a complaint with the DFEH alleging harassment, retaliation, and the denial of promotion, transfer, and accommodation. DFEH charges of discrimination under FEHA not included in a plaintiff's federal complaint "cease[ ] to exist as a pleading in federal court." *Ficarola v. Lockheed Corp.*, 193 Cal. App. 3d 489, 493 (1993). Nurse's complaint only alleges that since January 20, 1993, he has been denied a reasonable accommodation due to disability and age and as a result he had failed to qualify as a temporary lead worker. As Nurse's complaint does not include a cause of action for harassment or retaliation for his filing of a grievance, he has voluntarily abandoned these causes of action.

C. The remaining Claims

United asserts that all of Nurse's remaining claims are either time-barred or insufficient evidence exists to establish a prima facie case of age discrimination.

1. Statute of Limitations

United argues that any cause of action for acts of alleged discrimination that occurred more than one year before Nurse filed his DFEH charge are both time-barred and inadmissible as evidence of discrimination. "No complaint may be filed [with the DFEH] after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred." Cal. Gov't Code § 12960. After receiving a no further action letter from DFEH, the plaintiff has one in which to file a civil suit. Cal. Gov't code § 12965. Nurse's complaint alleges that since January 20, 1993, he was denied a reasonable accommodation for a known disability. "This was done . . . in order to force plaintiff to retire. As

of February 3, 1993, plaintiff had failed to qualify as a temporary lead worker, a job plaintiff could do and instead plaintiff was placed in a much more demanding job." It is the wrongful act, that he was discriminated against based on his age in the denial of the temporary lead mechanic position, that triggers the statute of limitations period. Thus, United's alleged violation of FEHA, Cal. Gov't Code § 12941, occurred at the time of the wrongful act, on January 20, 1993 and after. The DFEH charge was filed on January 5, 1994, less than one year after the wrongful act. Consequently, Nurse's claim of age discrimination based on the denial of the temporary lead mechanic position is not time-barred.

As the other alleged previous acts of discrimination occurred prior to January 5, 1993, they are not actionable. Thus, the only act on which Nurse can base his age discrimination claim is the denial of the lead mechanic position. However, while these other acts are not themselves actionable, they may be used by Nurse to establish elements of his age discrimination claim, such as demonstrating that the employer's legitimate business reason is just a pretext to a discriminatory motive.

2. Age Discrimination Claim

In addressing a FEHA cause of action, California courts have relied on and adopted the analytical framework of the federal Age Discrimination in Employment Act ("ADEA") and the legal analysis developed by the federal cases. *Stephens v. Coldwell Banker Commercial Group, Inc.*, 199 Cal. App. 3d 1394, 1399-1400 (1988). The basic allocation of burdens and order of presentation of proof for an age discrimination claim is as follows:

> [A]plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its

> employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

Wallic v. J.R. Simplot Co., 26 F.3d 885 (9th Cir. 1994) (quoting *Lowe v. City of Monrovia*, 775 F.2d 998, 1007 (9th Cir. 1985), *as amended*, 784 F.2d 1407 (1986). The plaintiff need only offer evidence which "gives rise to an inference of unlawful discrimination." *Lowe*, 775 F.2d at 1005 (quotation omitted).

To establish a prima facie case of age discrimination, the plaintiff must show that:

> (1) he was a member of a protected class [age 40-70];
> (2) he applied for a position for which he was qualified;
> (3) despite his qualifications, he was rejected; and
> (4) after his rejection, the position remained open and the employer continued to seek substantially younger applicants from persons of complainants qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *Selby v. Pepsico, Inc.*, 784 F. Supp. 750, 754 (N.D. Cal. 1991). The requisite degree of proof necessary to establish a prima facie case for an ADEA claim on summary judgment is minimal and does not even rise to the level of a preponderance of the evidence. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987), *cert. Denied* 498 U.S. 939 (1990). Neither party disputes that plaintiff, being sixty-eight years old, was a member of the protected class or that he was rejected for the lead mechanic position. United does, however argue that Nurse has not satisfied the second and forth elements necessary to establish a prima facie case.

Nurse argues that he satisfied the second criteria because he applied for a position as lead mechanic and was qualified

for such employment, despite his disability, based on his training, experience, and seniority. Nurse worked as a n aviation mechanic at United for twenty-six years and as a lead mechanic from 1984 to 1990. On the other hand, despite receiving training from August 1992 until January 1993, Nurse failed to qualify as a temporary lead mechanic. Nurse contends that United failed to qualify him for this position because of his age. Specifically, Nurse alleges that United wanted him to retire, thus his supervisor created unusually difficult obstacles for qualification specifically for him. As the question of whether Nurse was discriminated against in the lead mechanic training program is the essence of his suit, the court will not consider his failure to satisfactorily complete the training program as evidence that he was not qualified for the position. As United has presented no evidence that Nurse's prior work performance was unsatisfactory or that he was otherwise unqualified, the court finds that plaintiff satisfies the second element of a prima facie case in that he applied for a position for which he was qualified.

United next argues plaintiff cannot satisfy the fourth element: that after his rejection, the position remained open and the employer continued to seek applicants from substantially younger persons of complainant's qualifications. Nurse has not presented any evidence that after his rejection, the employer continued to seek younger applicants with complainant's qualifications. Nurse merely refers to other employees who successfully trained for temporary lead mechanic positions without identifying their age or when they were trained. While it may be true that two other individuals trained for lead mechanic and qualified after only three weeks, Nurse provides no evidence that either of these individuals were younger than him. Consequently, Nurse fails to establish the fourth element of a prima facie case of age discrimination.

Nurse argues that he need only "raise an inference of disparate treatment to establish a prima facie case, not actual proof of such treatment." *Warren v. City of Carlsbad,* 58 F.3d 439, 442 (9th Cir. 1995). "Proof of disparate treatment requires a showing that the employer treated some people less favorably than others because of their age." *Selby*, 784 F. Supp. At 754. To establish that his employer treated him less favorably than others because of his age, Nurse points to his unsubstantiated allegation that there was a disparity in training requirements between him and two other trainees and the statements made to him regarding his retirement. As discussed above, the disparity in training allegation, even if proven, does not establish disparate treatment because Nurse fails to identify the age of the other trainees. The statements,[3] the statement suggesting retirement shortly after his return from his first disability leave, the conversation between Nurse and Corallo where Nurse's retirement plans were discussed, and the alleged suggestion made by Hyland and his secretary that Nurse retire, are only direct evidence that United may have been discriminatorily motivated in its actions, not that Nurse was treated less favorably than other younger employees. Motive supports proving plaintiff's claim to pretext only after a prima facie case has been established and defendant has proven a legitimate business purpose. As the court finds plaintiff has not presented evidence sufficient to establish a prima facie case of age discrimination, United's motion for summary judgment is granted.

V. CONCLUSION

For the foregoing reasons, it is hereby ordered that defendant's motion for summary judgment is GRANTED.

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[3]Any other unidentified alleged statements are too vague and indefinite to provide evidence of discrimination.

IT IS SO ORDERED.

Dated: February 8, 1996

/s/ Samuel Conti
United States District Judge

APPENDIX B

[Filed 2-24 1997]

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

D. C. No. CV-94-03774-SC

GORDON NURSE
Plaintiff-Appellant,

v.

United Airlines, Inc.,
Defendant-Appellee.

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted February 11, 1997
San Francisco, California

Before: GOODWIN, LEAVY and THOMAS, Circuit Judges.

Because the parties are familiar with the factual and procedural background of this case, we will not repeat it here. Gordon Nurse appeals the district court's grant of summary judgment in favor of defendant United Air Lines, Inc. ("United") in his action for age and disability discrimination under the California Fair Employment and Housing ACT

("FEHA"), Cal. Gov't Code 12900-12996. We affirm the district court.

WORK-RELATED DISABILITY CLAIM

Nurse contends that the 1993 amendment to Cal Gov't Code § 12993(a) repealed the exclusive remedy and preemption provisions of the California Workers Compensation Act ("WCA"). We find it unnecessary to decide this issue of state law. The 1993 amendment to § 12993(a) went into effect on January 1, 1994, *see City of Moorpark*, 49 Cal. App. 4th at 980, 57 Cal. Rptr. At 160; *Cammack*, 49 Cal. App. 4th at 220 n.9, 55 Cal. Rptr. At 847 n.9; and all the conduct of which Nurse complains occurred prior to this time. Under these circumstances, the pre-amendment version of § 12993(a) applies to Nurse's complaint and limits his remedies to the WCA. *See Adkins v. State*, 50 Cal. App. 4th 1802, ___ n.28, 59 Cal. Rptr. 2d 59, 71 n.28 (1996) (applying pre-amendment § 12993(a) to conduct which occurred prior to January 1, 1994).

AGE DISCRIMINATION CLAIM

We review a district court's grant of summary judgment *de novo*. *Warren v. City of Carlsbad,* 58 F.3d 439, 441 (9th Cir. 1995), *cert. Denied*, ___ U.S.___, 116 S. Ct. 1261, 134 L. Ed. 2d 209 (1996). We must determine whether the evidence, viewed in a light most favorable to the non-moving party, presents any genuine issues of material fact and whether the district court properly applied the law. *Id.*

California courts evaluating claims of age discrimination under the California Fair Employment and Housing Act ("FEHA") have adopted the standards and analytical framework of the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, as developed in

the federal cases interpreting and applying the ADEA. *Stephens v. Coldwell Banker Commercial Group, Inc.*, 199 Cal. App. 3d 1394, 1399-1400, 245 Cal. Rptr. 606, 609 (1988).

To establish a *prima facie* case of discrimination, a plaintiff must offer evidence of discriminatory intent sufficient to give rise to an inference of unlawful discrimination. *Nidds v. Schindler Elevator Corp.*, 1996 WL 734053, at *3 (9th Cir. Dec. 24, 1996). "The *prima facie* case may be based either on a presumption arising from the factors such as those set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973), or by more direct evidence of discriminatory intent." *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1409 (9th Cir.) (Quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)), *cert. Denied*, ___ U.S. ___, 117 S. Ct. 295, 136 L. Ed. 2d 214 (1996).

The district court granted United's motion for summary judgment because it found that Nurse had failed to establish a *prima facie* case. The court held that Nurse did not prove the fourth prong of the *McDonnell Douglas* test because he had failed to present any evidence that any of the other mechanics who trained to be and eventually were qualified for the temporary lead position were younger than Nurse.

Nurse conceded at oral argument that he had not met the *McDonnell Douglas* test, but urges that *McDonnell Douglas* is not the exclusive method by which a *prima facie* case may be established. To be sure, a plaintiff may establish a *prima facie* case of age discrimination without satisfying the four-pronged *McDonnell Douglas* test by presenting actual evidence, direct or circumstantial, of the employer's discriminatory motive. *Lowe v. City of Monrovia*, 775 F.2d 998, 1006-07, 1009 (9th Cir. 1985), *as amended*, 784 F.2d 1407 (1986). "When a plaintiff does not rely exclusively on the presumption but seeks to establish a *prima facie* case

through the submission of actual evidence, very little such evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a factfinder." *Schnidrig*, 80 F.3d at 1409 (quoting *Lowe*, 775 F.2d at 1009).

In support of his theory, Nurse cites to various incidents over a span of years which he alleges show an animus toward him based on his age. However, his claim of actual employment discrimination based on age is limited to one episode. Nurse claims that his supervisor made it more difficult for him than other trainees to qualify as a temporary lead mechanic by requiring him to demonstrate proficiency in all areas of engine maintenance. He claims this requirement prevented him from qualifying for five months, while others qualified in a matter of weeks.

However, no ultimate determination as to whether Nurse would obtain the position was made because Nurse left the job due to disability. Thus, the issue has not been resolved. Nurse has not been terminated; he has not been denied promotion; he has not been denied position. In short, no actual employment discrimination has yet occurred. United might well certify him for the position upon his return. Thus, no actionable employment discrimination has occurred and summary judgment on this claim was proper. *See e.q., Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992) ("Because Candelore failed to identify employment benefits or opportunities that she was entitled to but did not receive, she has not stated a prima facie case of discrimination under Title VII.").

We have carefully considered the balance of Nurse's arguments and find them without merit. We affirm the district court's refusal to extend the time for discover, its finding that Nurse had abandoned his claims for harassment and retaliation, its finding that any acts of discrimination prior

to Janury 5, 1993 are time-barred, and its grant of summary judgment on Nurse's work-related disability claim. We will not cosider Nurse's claims under the Americans with Disabilties Act for the first time on appeal.

The district court's grant of summary judgment in favor of United is AFFIRMED.

Dated: 4-28 1997

/s/ Gail Nelson
Deputy Clerk

Gordon Nurse
Plaintiff - Appellant

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United Airlines
Defendant - Appellee

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EXHIBIT C

[Filed 4-18 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 96-15480
D.C. No. CV-94-03774-SC

GORDON NURSE
Plaintiff-Appellant,

v.

UNITED AIRLINES, INC.,
Defendant-Appellee.

ORDER

Before: GOODWIN, LEAVY and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

EXHIBIT D

[Filed 9-14 1994]

IN THE SUPERIOR COURT OF
SAN FRANCISCO COUNTY, CALIFORNIA

Case Number 963704

GORDON NURSE,
Plaintiff,

v.

UNITED AIRLINES,
Defendant.

COMPLAINT
Discrimination

The plaintiff is claiming to have suffered wage loss, hospital and medical expenses, general damage and attorney's fees and costs. The plaintiff prays for compensatory damages according to proof and attorney's fees and costs. The cause of action indicated is Intentional Tort.

/s/ Carlos M. Alcala
Attorney for Plaintiff

CAUSE OF ACTION
Intentional Tort

Attachment to Complaint

Plaintiff, Gordon A. Nurse alleges that defendant United Airlines was the legal cause of damages to plaintiff. By the following acts or omissions to act, defendant intentionally caused the damage to plaintiff on January 20, 1993 at San Francisco, CA.

> "On January 20, 1993 and continuing plaintiff was denied a reasonable accommodation for a knew [sic] disability.
>
> This was done in order to discriminate against plaintiff due to disability and age in order to force plaintiff to retire.
>
> As of February 3, 1993, plaintiff had failed to qualify as a temporary lead worker, a job plaintiff could do and instead plaintiff was placed in a much more demanding job.
>
> On January 5, 1994, plaintiff filed a charge of discrimination with the Department of Fair Employment and Housing.
>
> On January 21, 1994, plaintiff received a right to sue letter.
>
> Plaintiff has no other plain, speedy or adequate remedy at law."

STATEMENT OF DAMAGES

Plaintiff's damages are accruing. The damages for Gordon Nurse, are the following:

Special Damages	$ 100,000.00
General Damages	$ 900,000.00
Total Damages	$1,000,000.00

Date: 9-7 1994

/s/ Carlos M. Alcala
Attorney at Law

VERIFICATION

I declare that I am the plaintiff in this matter. I have read the foregoing Complaint and found it to be true to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 29th day of June, 1994, in Sacramento, California.

/s/ Gordon Nurse

EXHIBIT E

[Received 10-31 1994]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GORDON NURSE
Plaintiff,

v.

UNITED AIRLINES,
Defendant.

NOTICE OF REMOVAL OF ACTION
UNDER 28 U.S.C. § 1441(a) and (b) (DIVERSITY)

To the clerk of the above-entitled court:

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1441(a) and (b), defendant United Air Lines, Inc. ("UNITED"), erroneously sued herein as United Airlines, hereby removes the state court action described below to this Court. In support thereof, UNITED states as follows:

1. On September 14, 1994, Case No. 963704, entitled *Gordon Nurse v. United Airlines, and Does 1 to 20*, was filed in the Superior Court of the State of California for the County of San Francisco. A copy of the Summons and Complaint, together with a Statement of Damages, a Notice and a Status and Setting Conference Statement, are attached hereto as Exhibit A and incorporated herein by this reference. These are the only process, pleadings and/or orders which have been served upon UNITED.

2. The first date upon which UNITED received a copy of the Complaint was September 28, 1994, when UNITED was served with a copy of the Complaint, a Summons from the Superior Court of the State of California for the County of San Francisco, a Statement of Damages, a Notice and a Status and Setting Conference Statement. Such service, which was made fewer than 30 days propr to the filing of this Notice of Removal of Action, was the first notice UNITED received of the pendency of this action and, accordingly, of the existence of diversity jurisdiction between the parties.

3. This action is a civil action over which this Court has original jurisdiction under 28 U.S.C. §1332. It may be removed to this Court by UNITED pursuant to the provisions of 28 U.S.C. §1441(a) and (b) because it is a civil action between citizens of different states wherein the matter in controversy exceeds the sum of $50,000.00, exclusive of interest and costs, in that:

(a) UNITED is informed and believes that plaintiff GORDON NURSE was, at the time of the filing of this action, and still is, a citizen of the State of California.

(b) UNITED was, at the time of the filing of this action, and still is, a corporation incorporated under the laws of the State of Delaware, having its principal place of business in Cook County, State of Illinois. Thus, UNITED is a citizen of the states of Delaware and Illinois, and complete diversity exists between UNITED and plaintiff GORDON NURSE.

(c) Pursuant to 28 U.S.C. §1441(a), for purposes of removal, the citizenship of defendants sued under fictitious names should be disregarded. Thus, the citizenship of Does 1-20 should be disregarded.

(d) In the Statement of Damages served on UNITED currently with his Complaint, Plaintiff GORDON NURSE alleges that (1) his special damages in this action total at least $100,000, and that (2) his general damages in this action total a minimum of $900,000, for a total of at least $1,000,000.00.

4. Pursuant to 28 U.S.C. §1446(d), UNITED has served upon Plaintiff GORDON NURSE a Notice to Plaintiff of Filing of Notice of Removal of Action, a copy of which is attached hereto as Exhibit B and incorporated herein by this reference.

5. Pursuant to 28 U.S.C. §1446(d), UNITED has filed with the Superior Court of California for the County of San Francisco, and served upon Plaintiff GORDON NURSE, a Notice to Superior Court of Filing of Notice of Removal of Action, a copy of which is attached hereto as Exhibit C and incorporated herein by this reference.

DATED: October 27, 1994

MAYER, BROWN & PLATT
WILLIAM J. REIFMAN
JEROME M. JAUFFRET

/s/ Jerome M. Jauffret
Attorneys for Defendant
United Air Lines, Inc.

EXHIBIT F

[Received 11-4 1994]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case Number C94-3774-SC

GORDON NURSE,
Plaintiff,

v.

UNITED AIRLINES,
Defendant.

ANSWER OF DEFENDANT
UNITED AIR LINES, INC.
TO PLAINTIFF'S
COMPLAINT FOR DAMAGES

Pursuant to Rule 8 of the Federal Rules of Civil Procedure, defendant United Air Lines, Inc. ("United"), erroneously sued herein as United Airlines, hereby answers plaintiff Gordon Nurse's ("plaintiff") Complaint for Damages as follows:

1. Answering the averments in ¶ 3.a. of plaintiff's Complaint, United admits that it is a business organization, and affirmatively states that it is a corporation incorporated in the State of Delaware with its principal place of business in Cook County, Illinois.

2. United is without knowledge or information sufficient to form a belief as to the truth or falsity of the averments in ¶ 3.b. of plaintiff's Complaint, and on that basis denies those averments.

3. Answering the averments in ¶ 5 of plaintiff's Complaint, United admits that plaintiff has alleged in his Complaint that his purported damages occurred within the jurisdictional area of the Superior Court of the State of California for the County of San Francisco. Other than so admitted, United denies each and every averment in ¶ 5 of plaintiff's Complaint, and specifically denies that United has caused plaintiff any of the damages alleged in his Complaint, or any other damages of any kind, or that United is liable to plaintiff for any damages, or for any sum whatsoever, or at all.

4. United denies each and every averment in ¶ 8 of plaintiff's Complaint.

5. Answering the averments in ¶ 9 of plaintiff's Complaint, United admits that plaintiff has alleged in his Complaint that the relief he seeks therein against United is within the jurisdiction of the Superior Court of the State of California for the County of San Francisco. Other than so admitted, United denies each and every averment in ¶ 9 of plaintiff's Complaint, and specifically denies that plaintiff is entitled to any of the relief in [sic] seeks in his Complaint, or to any relief whatsoever, against United.

6. Answering the averments in ¶ 10 of plaintiff's Complaint, United admits that plaintiff has prayed in his Complaint for judgment, for costs of suit, for such relief as is fair, just and equitable, for compensatory damages according to proof and for attorneys' fees and costs. Other than so admitted, United denies each and every allegation in ¶ 10 of plaintiff's Complaint, and specifically denies that United has caused plaintiff any of the damages alleged in his Complaint, or any other damages of any kind, or that United is liable to

plaintiff for any damages of any kind, or for costs of suit, or for attorneys' fees and costs, or for any sum whatsoever, or that plaintiff is entitled to judgment, or to costs of suit, or to damages of any kind, or to attorneys' fees and costs, or to any type of relief whatsoever, against United.

7. Answering the averments in ¶ 11 of plaintiff's Complaint, united admits that plaintiff has attached to his Complaint what he purports to be a cause of action for an intentional tort. Other than so admitted, United denies each and every averment in ¶ 11 of plaintiff's Complaint.

8. United denies each and every averment in ¶ IT-1 of the First Cause of Action in plaintiff's Complaint, except that:

a. United admits that as of February 3, 1993, plaintiff had failed to qualify as a temporary lead worker;

b. United admits that plaintiff has filed a charge of discrimination with the Department of Fair Employment and Housing (Charge No. FEP 93-94 E2-1063-00-c); however, United is without knowledge or information sufficient to form a belief as to the truth or falsity of the averment that plaintiff filed that discrimination charge on January 5, 1993, and on that basis denies that averment;

c. United is without knowledge or information sufficient to form a belief as to the truth or falsity of the averment that on January 21, 1994 plaintiff received a right to sue letter, and on that basis denies that averment; and

d. answering the averment that plaintiff has no other plain, speedy or adequate remedy at law, United denies that plaintiff is entitled to any remedy whatsoever against United in connection with the averments in his Complaint, or for any other reason whatsoever.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE
(Failure to State A Cause of Action)

1. Neither plaintiff's Complaint nor any cause of action asserted therein states facts sufficient to constitute a cause of action against United.

SECOND AFFIRMATIVE DEFENSE
(Lack of Proximate Cause)

2. Upon information and belief, United alleges that the acts and omissions of plaintiff and/or persons or entities other than United were the sole and proximate cause of the damages, if any, which plaintiff alleges in his Complaint.

THIRD AFFIRMATIVE DEFENSE
(Waiver and Estoppel)

3. Upon information and belief, United alleges that plaintiff has waived and is estopped and barred from alleging the matters set forth in his Complaint and each of the causes of action asserted therein.

FOURTH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

4. Upon information and belief, United alleges that plaintiff has failed to mitigate his damages, and to the extent of such failure to mitigate, any damages awarded to plaintiff should be reduced accordingly.

FIFTH AFFIRMATIVE DEFENSE
(California Civil Code Section 1431.2)

5. United alleges that its liability, if any, for non-economic loss must be prorated according to the provisions of California Civil Code § 1431.2.

SIXTH AFFIRMATIVE DEFENSE
(Workers Compensation)

6. Plaintiff is barred from seeking any damages from purported physical or emotional injuries allegedly suffered as a result of his employment in that the sole and exclusive remedy in this respect is and was governed by California Worker's Compensation Act, Labor Code Sections 3320, *et seq.*

SEVENTH AFFIRMATIVE DEFENSE
(Statue of Limitations)

7. Plaintiff is barred from seeking any damages from purported physical or emotional injuries allegedly suffered as a result of his employment in that such a claim is barred by the applicable statutes of limitation, including, without limitation, California Code of Civil Procedure § 340 (3).

EIGHTH AFFIRMATIVE DEFENSE
(Justification or Privilege)

8. United's alleged actions, if done at all, are justified and/or privileged since, at all relevant times herein, United acted in accordance with United's corporate and administrative policies.

NINTH AFFIRMATIVE DEFENSE
(Justification or Privilege)

9. United's alleged actions, if done at all, are justified and/or privileged since, at all relevant times herein, Defendants acted pursuant to its rights and duties under the applicable laws, including, without limitation, the applicable laws of the United States and of the State of California.

TENTH AFFIRMATIVE DEFENSE
(Failure to Exhaust Administrative Remedies)

10. Upon information and belief, United alleges that plaintiff has failed to exhaust his administrative remedies in connection with the allegations in his Complaint.

ELEVENTH AFFIRMATIVE DEFENSE
(Subsequently Discovered Defenses)

11. United alleges as an affirmative defense that it intends to rely upon such other applicable defenses as my become apparent at subsequent stages of this action, and hereby reserves the right to assert such defenses.

PRAYER

WHEREFORE, United prays for judgment as follows:

1. That plaintiff take nothing by his Complaint;
2. That the Complaint and each purported cause of action thereof be dismissed with prejudice;
3. For all costs and fees herein incurred; and
4. For such other and further relief as the Court deems just and proper.

DATED: November 2, 1994

MAYER, BROWN & PLATT
WILLIAM J. REIFMAN
JEROME M. JAUFFRET

/s/ Jerome M. Jauffret
Attorneys for Defendant
United Air Lines, Inc.

EXHIBIT G

[Filed 1-12 1996]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Number C94-3774-SC

GORDON NURSE,
Plaintiff,

v.

UNITED AIRLINES,
Defendant.

OPPOSITION TO
SUMMARY JUDGMENT/ADJUDICATION;
POINTS & AUTHORITIES;
STATEMENTS OF FACTS;
DECLARATIONS IN SUPPORT

INTRODUCTION

COMES NOW the Plaintiff in the above-entitled and numbered cause and files this, his Opposition to Summary Judgment/Adjudication, Statement of Facts, Memorandum of Points and Authorities, and Declarations in support thereof. Plaintiff also objects to the declaration of Nicholas Hyland, attached to Defendant's Motion, for failure to comply with Rule 56(e), FRCP, in that the declaration is not based on personal knowledge in large part, and includes exhibits

inadmissible as hearsay, consisting of unauthenticated doctors' reports.

Mr. Hyland testified during his deposition, the relevant pages attached hereto as an exhibit, that he had no knowledge of these reports other than that they were supplied by his attorney and attached to the declaration his attorney had prepared for his signature. (See Hyland dep. 32:11-34:2, 35:17-36:8).

Plaintiff opposes Defendant's Motion for Summary Judgment/Adjudication on several grounds, including but not limited to the fact that Defendant has only sought summary judgment on Plaintiff's age and disability claims, completely ignoring Plaintiff's claims that he was harassed, denied promotion, denied a transfer, denied accommodation, and was retaliated against and forced out of the workforce. (See Verified DFEH Complaint, Exhibit 2). Plaintiff also opposes said motion on the ground that Defendant was willfully and intentionally in bad faith committed discovery abuses in that the parties had agreed on informal extensions of time for production of documents and other discovery, and Plaintiff extended the time for Defendant to respond to his request for production, to his request for admissions and interrogatories to December 18, 1995. However, Defendant failed to produce all the documents requested by that date, the day of the Plaintiff's deposition. Almost daily requests resulted in almost daily assurances from Defendant's attorney that the documents and answers to interrogatories and request for admissions were forthcoming. First, Defendant claimed that because of the holidays, he could not get in touch with his clients at United in their main office in Chicago. Then, after the holidays, on the 29th of December, Defendant's attorney again assured Plaintiff's attorney that the documents and other discovery were forthcoming, and that they would be faxed post haste. However, as of this writing, January 3rd through the 5th, Defendant has still failed to either produce all the

documents, respond, or object, despite the fact that Plaintiff has complied with all discovery requests from the Defendant, and agreed to extension after extension of time for Defendant to respond. As Defendant has now filed a Motion for Summary Judgment, it is clear that Defendant intends to deny Plaintiff access to documents to support his Opposition, preventing Plaintiff from filing her Opposition within 21 days of the hearing date as required by the local rules, and to cut off Plaintiff's access to evidence to assist in defeating Defendant's Motion. This misuse of good faith discovery agreements between counsel subverts the goals of the discovery process and is evidence of bad faith on the part of opposing counsel, an officer of the Court. Plaintiff's counsel, in her declaration, attached, reviews these agreements between her and opposing counsel and requests a denial of this Motion on the basis that failure to produce this discovery as agreed has seriously impaired Plaintiff's ability to oppose this motion. CCP 437 (c) (h).

STATEMENT OF FACTS

Plaintiff is an Aviation Mechanic who has worked for United for the past twenty-six years. (Exhibit 3, paras. 1 and 2). In August of 1991, Mr. Quam, his then supervisor, requested a medical evaluation on the Plaintiff from his employer. (Exhibit 2, p. 1, para. 1). Following this evaluation, Mr. Quam informed the Plaintiff that he would prefer if the Plaintiff would retire. id. There were light duty jobs available at United, such as a vacancy in D93 for which the Plaintiff was passed over and a non-disabled employee, Mr. Casey, hired instead. Both the Plaintiff and Mr. Casey were under the union contract. Mr. Casey had less seniority than the Plaintiff, and less than or an equal amount of experience. The job paid one dollar more per hour than the

Plaintiff's mechanic's pay. id. The Plaintiff had applied for this position as a reasonable accommodation since it offered more flexibility in working within the Plaintiff's work restrictions prescribed by his Orthopedic Surgeon, Dr. Wayne Chronister. (Id at page 2, top para.). Plaintiff was passed over for other light duty jobs in D92, D93 and D91, jobs which were given to non-disabled employees such as Ivan, Delores, McClellan and Vega. id. Plaintiff was also denied a day shift job in the nut and bolt recovery area. (Plaintiff's dep. 46:2-46:21).

Following the Plaintiff's return to work (in 1991), United found him a job assembling CF6 stator cases. (Hyland dep. 18:24-19:19). Plaintiff was able to perform his job assembling stator cases without difficulty. (Plaintiff's decl., para. 5). (Plaintiff's dep. 46:25 - 50:4). Plaintiff never complained to his supervisor, Corallo about the work assembling stator cases, and Corallo did not have any complaints about the Plaintiff's work. (Corallo dep. 14:10-14:15). Plaintiff could return to work at United at a position within his classification of shop mechanic (assuming his doctors allowed him to return to work). (Hyland dep. 43:23-44:3). Plaintiff believes he could return to work at United, if not assembling stator cases then in another position within his current work restrictions. (Plaintiff's decl. Para.6). The average age of shop mechanics is close to fifty. (Hyland dep. 56:4-56:12). There is at least one other shop mechanic who uses a cane like Mr. Nurse. (Hyland dep. 56:22-56:25). Other shop mechanics work at United who have industrial back injuries. (Hyland dep. 57:8-57:11). Another shop mechanic who was totally blind was employed by United in a line position after his injury. (Hyland dep. 54:8-54:24).

Plaintiff filed a grievance with his supervisor Pete Corallo on August 7, 1992. (Exhibit 2, p. 2 para. 3; Hyland dep. 22:10-21). Following his grievance, Pete Corallo decided, after consulting with his supervisor, Nicholas Hyland, to

grant Plaintiff the opportunity to become temporary lead qualified. (Hyland dep. 23:4-10). Plaintiff worked from August of 1992 through January of 1993 training for temporary lead. Plaintiff was told he could not proceed with a union grievance because the temporary lead job was considered management. (Plaintiff's dep. 78:18 - 80:6). Plaintiff had already worked as a qualified lead from 1984 until 1990. (Plaintiff's dep. 74:14 - 74:20). Plaintiff had filed an EEOC charge when his temporary lead credential was taken away from him in 1990. (Plaintiff's dep. 75:9-75:17).

Plaintiff started training for temporary lead in about August of 1992 and continued until Mr. Nurse went out on disability in February of 1993. (Plaintiff's dep. 59:15 - 72:20). However, Pete Corallo made it more difficult for the Plaintiff to qualify for temporary lead than it should have been. (Ex. 2 p. 2 paras. 3 and 4). Plaintiff was put through difficult training and then not given the job. Training usually lasted three weeks. United treated the Plaintiff differently than anyone else who trained for the job. (Plaintiff's dep. 114:7-115:8). Vega, who is not disabled, trained for the job for three weeks and go the job. Mr. Casey, who is also not disabled, trained for the job for three weeks and got the job. (Plaintiff's dep. 117:2-117:14, 122:1-122:25). After Plaintiff had been given the job assembling stator cases, he subsequently applied for a position which involved mainly sitting. The job was given instead to Mr. Casey, who had less seniority than the Plaintiff, is not disabled, had less or equal experience to the Plaintiff, and both were covered by the union contract. (Plaintiff's dep. 160:25-164:16).

Corallo required the Plaintiff to demonstrate proficiency in all four areas, while none of the permanently qualified leads of each department are required to possess such proficiency in all four areas (Ex. 2 p. 3 para. 1). What was required by Mr. Corallo was that Nurse become familiar with all four areas of D33, which are, the balance area, the sub

assembly of N1 and N2 modules, assembly of turbine midframes, rear frames, stator cases and rotors, and the core area. (Plaintiff's dep. 61:13-61:18). Unlike the Plaintiff, persons qualified as permanent leads become qualified from the first day regardless of his/her experience or knowledge in the area. (Ex. 2, p. 3, para. 1). A temporary lead man is used when there is no regular lead man for the shift. (Plaintiff's dep. 63:3-63:5). Pete Corallo testified in his deposition that there is no specific or set time that it takes to qualify as a temporary lead (Corallo dep. 10:10-14). However the length of time is usually less than three months. (Corallo dep. 11:13-25). Plaintiff was in a position to qualify for temporary lead man for six months, yet Pete Corallo failed to qualify him. (Corallo dep. 10:1-3). Plaintiff had prior experience as a lead mechanic from 1984 to 1989. The lead job involves checking other people's work. (Plaintiff's dep. 118:8-120:7). Plaintiff was never qualified by Mr. Corallo for the temporary lead position. (Plaintiff's dep. 82:7-82:19).

Plaintiff's supervisor, Pete Corallo, failed to make a reasonable accommodation for the Plaintiff in training him for temporary lead and forced him to do work which he would not normally have to do in order to qualify. (Ex. 2 p. 3 para. 2). Plaintiff requested the temporary lead position as a reasonable accommodation under the American with Disabilities Act, according to his grievance. (Plaintiff's dep. 101:12-102:24). Plaintiff instead was given rigid and rigorous work assignments over a long period of time not in the framework of his permanent restrictions. (Ex. 2, p. 4, para. 5 to p. 5, top). If Plaintiff had qualified for temporary lead, he would have worked checking logs and routing parts. It was basically a sit-down job. (Plaintiff's dep. 83:14-85:12). Plaintiff had also grieved with the union a bypass for overtime, which occurred when Pete Corallo was looking for senior mechanics to work overtime. Instead of giving the

Plaintiff the overtime, Corallo bypassed him. Plaintiff won his grievance. (Plaintiff's dep. 181:15-182:13).

Plaintiff was constantly asked by Corallo when he was going to retire. (Ex. 2, p. 4 para. 3, Plaintiff's dep. 150:1-150:9). Plaintiff received a full retirement package from Pete Corallo (Plaintiff's dep. 157:8-157:12). Mr. Hyland also discussed in a coercive manner the Plaintiff's retirement. (Ex. 2, p. 6, para. 2). Plaintiff was told he was getting too old to work and on several occasions Mr. Doyle, at the time his manager, told him it was time for him to retire, after he had filed his EEOC complaint (Plaintiff's dep. 127:15-128:17).

Plaintiff has been on Workers' Compensation disability leave since January 1993. His attorney did request that United allow him to go back to work (Plaintiff's dep. 93:10-93:17).

POINTS AND AUTHORITIES

I. SUMMARY JUDGMENT SHOULD BE DENIED AS THERE ARE DISPUTED MATERIAL FACTS REGARDING PLAINTIFF'S CLAIMS OF DISCRIMINATION ON THE BASIS OF DISABILITY, AGE AND RETALIATION.

Under the *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 803-805, 36L. Ed. 2d 668, 93 S. Ct. 1817, for a prima facie case of discrimination the plaintiff must prove:

1. That he belongs to a protected class.

2. That he applied for and was qualified for a job for which the employer continued to seek applicants from persons of complainant's qualifications.

3. That, despite his qualifications, he was rejected.

4. That, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Rejection of the defendant's proffered reason permits the trier of fact to infer the ultimate fact of intentional discrimination. *St. Mary's Honor Center v. Hicks,* (1993) 509 U.S. ___, 113 S. Ct. 2742, 125 L. Ed. 2d 407, 418 and footnote 4. In determining whether a triable issue of fact exists, the moving parties affidavits are strictly construed while those of the opposing party are liberally construed. *Walker v. Blue Cross of California,* 6 Cal. Rptr. 2d 184, 187 (1992) Where the trier of fact disbelieves the defendant's claimed non-discriminatory reason for its conduct, then, without further evidence, an inference of intentional discrimination is justified. *Barber v. Rancho Mortg. & Inv. Corp.,* 32 Cal. Rptr. 2d 906 (1994). (Holding that *St. Mary's Honor Center v. Hicks,* 125 L. Ed. 2d 407, 418-419 (1993), discussed infra, "put to rest" any confusion raised by a number of cases which granted summary judgment to a discrimination defendant who presented evidence of a nondiscriminatory reason which was not rebutted by the plaintiff's evidence).

The material facts as far as Plaintiff's claims are as follows:

Plaintiff was employed as an Aviation mechanic by United for 23 years. He has a work-related injury and certain work restrictions as a result. However, these work restrictions did not prevent him from working, and in fact, United found him a job assembling stator cases in 1991. He was able to perform this job without difficulty. Plaintiff was also in training to qualify as a temporary lead man, which would have had certain benefits for him. This training was approved by Mr. Hyland and was under the supervision of Pete Corallo. However, Pete Corallo made the Plaintiff's training more rigorous, difficult and lengthier than for others qualifying as lead men. Corallo failed to qualify Nurse as a temporary lead man. Plaintiff was also bypassed for other desirable light work positions within his work restrictions;

positions which were given to younger, non-disabled men. Defendant was presented only one allegedly legitimate business reason for this disparate treatment; that the Plaintiff's discrimination claim on the basis of disability is barred by the exclusive remedy provisions of the California Worker's Compensation Act. However, Defendant fails to mention that this discriminatory treatment occurred before Plaintiff went out on this most recent disability in February 1993. Plaintiff was working, and was not out on disability leave, when this discriminatory treatment occurred. Defendant's claimed legitimate business reason for its treatment of the Plaintiff is pretextual, as all the jobs Plaintiff applied for were compatible with his work restrictions, he was qualified for the positions by experience and seniority, and yet the positions were given to younger, non-disabled men.

Plaintiff was also retaliated against by his supervisor, Pete Corallo. Plaintiff had won a union grievance over his supervisor for bypassing him for overtime. Plaintiff had filed an EEOC complaint in 1990 or 1991, when his temporary lead credentials were taken from him. All the discriminatory acts regarding job opportunities occurred within a short period of time after the Plaintiff complained. Defendant has offered no legitimate business reason for the denial of these job opportunities which met the Plaintiff's work restrictions. In *Denney v. Universal City Studios, Inc.* (1992) 10 Cal. App. 4th 1226, 13 Cal. Rptr. 2d 170, 175, the Court reversed a grant of summary judgment on a retaliation claim on the basis of an inconclusive record. Here, Plaintiff's evidence that he had filed an EEOC complaint in 1990 or 91, that he had also filed a grievance against his supervisor, Pete Corallo, on the bypass for overtime which was found in his favor, and that he was denied job opportunities at United which he applied for after his return from disability leave in 1991, and that his supervisor, Pete Corallo, trained him unnecessarily long for the temporary lead position and put him through an

unnecessarily rigorous training schedule incompatible with his work restrictions, is unrefuted by the Defendant. Defendant relies on *Langridge v. Oakland Unified School District*, 25 Cal. App. 4th 664 (1994), and *Jimeno v. Mobil Oil Corp.*, 66 F. 3d 1514 (9th Cir. 1995) regarding the California Worker's Compensation Act as the exclusive remedy for a work-related physical disability discrimination claim. However, Defendant misses the point. Plaintiff is complaining of the denial of job opportunities *before* his latest industrial injury. As a disabled employee, Plaintiff was entitled to job opportunities available for which the Plaintiff qualified. Yet, the Plaintiff was passed over for these positions. Plaintiff was also forced to work outside his work restrictions by Pete Corallo when he was training for temporary lead; a violation of reasonable accommodation.

Plaintiff has presented evidence on all four prongs under *McDonnell Douglas*. The test merely requires that a plaintiff raise an inference of disparate treatment to establish a prima facie case, not actual proof of such treatment. *Warren v. City of Carlsbad,* 58 F. 3d 439, 442 (9th Cir. 1995). At the summary judgment stage, a plaintiff is not required to prove that discrimination was the motivating factor, only to raise an inference. *Warren*, 58 F. 3d at 443.

II. HYLAND'S DECLARATION SHOULD BE STRICKEN, AT LEAST IN PART FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF FRCP 56 (E). The summary Judgment Rule, FRCP 56, determines what evidence a federal judge may consider on a Summary Judgment motion. *Northwestern National Insurance Co. V. Corby* (7th Cir. 1974), 503 F 2d 224. Federal procedural standards govern whether summary judgment is appropriate in any case and those standards include federal law as to the admissibility of evidence. *Utility Control Corp. V. Prince William Const. Co. Inc.*, (4th cir. 1977), 558 F. 2d 716. Even

when submitted with a summary judgment motion, evidence must to reduced to a form that would be admissible at trial. *Lawyer's Alliance for Nuclear Arms Control, Philadelphia Chapter v. Dept. Of Energy,* (ED PA 1991), 766 F. Supp. 318. Declarations and affidavits in support of summary judgment and their attachments are required to contain admissible evidence. Hyland's declaration, attached to the Motion for Summary Judgment, contains as attachments the exhibits marked B, D, J and K, being medical reports of Drs. Chronister, Lipton and Fogel respectively. Mr. Hyland is not a medical doctor and has not independent knowledge of Plaintiff's medical condition. (Hyland dep. 35:17-36:8). The file from which these medical reports were obtained was put together by United attorneys. id. Mr. Hyland has no personal knowledge of the contents or events described in Mr. Nurse's personnel file. He testified at his deposition that the only personal knowledge that he has is from going through Nurse's personnel file in answering the questions asked by United's attorney's. (Hyland dep. 32:9-35:12). Mr. Hyland cannot authenticate these documents, nor can he competently testify as to their contents, or veracity. Written documents incorporated by reference into affidavits or declarations are required to conform to the rules of evidence, including those relating to authentication (Evid. Code 1400 et seq.) and to the best evidence rule (Evid. Code 1500 et seq.) *Dugar v. Happy Tiger Recrods, Inc.* (1974) 41 Cal. App. 3d 811, 815, 116 Cal. Rptr. 412. The documents are inadmissible hearsay. The only documents Hyland could conceivably authenticate are the attendance records of Gordon Nurse, attached as exhibits A, E and F, a letter from United, C, a letter to Nurse from Hyland, H, and a copy of the union contract, I.

Furthermore, neither Hyland's declaration nor defendant's motion address the causes of action of discrimination framed by Plaintiff's pleadings, and discussed herein. Therefore, it is largely irrelevant to a determination of Defendant's motion

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for summary judgment. The standards of summary judgment are basically the same under California and federal law; for purposes of summary judgment, California courts are required to consider all inferences reasonable deducible from evidence submitted, strictly construe moving party's affidavits, and liberally construe counter affidavits; similarly, federal courts read the record in the light most favorable to the nonmoving party. *Buenavista v. City and County of San Francisco* (1989) 207 Cal. App. 3d 1168, 1172-73 n.2, 255 Cal. Rptr. 329.

III. PLAINTIFF HAS PRODUCED EVIDENCE OF A PRIMA FACIE CASE OF AGE DISCRIMINATION FOR WHICH DEFENDANT'S PROFFERED NONDISCRIMINATORY REASON - PLAINTIFF'S KNEE INJURY - IS PRETEXTUAL.

Under Government Code section 12941, that section of the California Fair Employment and Housing Act (FEHA) which prohibits an employer from discriminating against any individual over the age of 40 on the ground of age, California courts have adopted the framework developed by federal courts in employment discrimination claims arising under Title VII of the federal Civil Rights Act, 42 USC section 2000e et seq., and under the federal Age Discrimination in Employment Act (ADEA), 29 USC section 621 et seq. *Stephens vs. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal. App. 3d 1394, 1399-1400, 245 Cal. Rptr. 606; *Levy v. Regents of University of California* (1988) 199 Cal. App. 3d 1334, 1343-1344, 245 Cal. Rptr. 576. Plaintiff has the burden of a prima facie case. Once established, the burden shifts to the employer to produce a legitimate nondiscriminatory reason. Then the Plaintiff has the burden at trial of proving that a discriminatory reason more likely motivated the employer or that the employer's explanation is a pretext for unlawful discrimination. *Stephens*, supra, 199 Cal. App. 3d at 1400, *Levy*, supra 199 Cal. App. 3d at 1344.

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The plaintiff must present some evidence, direct or circumstantial, that the proffered reason was pretextual. *US Postal Service Bd. Of Govs. v. Aikens* (1983) 460 US 711, 713-714, 103 S. Ct. 1478, 1480-81. In the case at bar, Plaintiff has presented evidence that he is an older employee (i.e. over 40), that he is qualified for several positions at United by reason of his profession, aviation mechanic, and has been so employed for 23 years. The employer does not dispute Mr. Nurse's qualifications or performance record at United. Mr. Hyland testified during his deposition that there were sedentary jobs available at United. (Hyland dep. 52:8-52:18). Mr. Nurse has presented evidence through his deposition and exhibits that he was turned down for several positions at United prior to his latest Worker's Compensation injury. These were jobs within his work restrictions that he was qualified for by reason of training, experience, and seniority. He would still be eligible for these positions, as they were basically sedentary. However, he was turned down and younger, non-disabled employees given the jobs instead. The Defendant claims that the issue is moot because the Plaintiff was given a job, assembling stator cases, as a reasonable accommodation, and that the Plaintiff is disabled from doing any work now. However, the issue of Plaintiff's current ability to return to work is separate and apart from the issue of whether Plaintiff was discriminated against by being denied available jobs at United Compatible with his work restrictions. Plaintiff's current disability is only a limitation as to his damages as to the later issue. Plaintiff has testified, and the Defendant has not refuted this, that he was in training for temporary lead, eight hours a day, when he was injured. (Plaintiff's dep. 74:5-74:20), 85:6-85:12). The training, which was unnecessary as Mr. Nurse was previously qualified as lead man, (Plaintiff's dep. 74:20) which he was forced to do by Mr. Corallo, involved extensive, prolonged walking, climbing stairs, constant climbing, bending over, and

crawling. (Plaintiff's dep. 7-:9-72:20). Therefore, instead of just giving him the temporary lead classification which he was entitled to, the employer put the Plaintiff through unnecessary, prolonged training, outside his work restrictions, and still did not qualify him for temporary lead status. The employer also denied him other positions for which he was qualified. This behavior constituted disparate treatment and leads to an inference of discrimination on the basis of age and/or disability. Summary judgment is improper when a moving party's inference is contradicted by another inference raising a triable issue of fact. *Hepp v. Lockheed-California Co.*, (1978) 86 Cal. App. 3d 714, 717-718, 150 Cal. Rptr. 408. Neither can the Court weigh one inference against another or against other evidence in proceeding for summary judgment. *Saylin v. California Ins. Guarantee Assn.* (1986) 179 Cal. App. 3d 256, 261, 224 Cal. Rptr. 493. The moving party on a summary judgment motion must negate matters that the non-movant would have to prove at trial. *BILJAC Associates v. First Interstate Bank* (1990) 218 Cal. App. 3d 1410, 1421, 267 Cal. Rptr. 819.

Plaintiff has testified to remarks that he was too old and should retire. Other federal courts have held such remarks to be direct evidence of age discrimination. See *Perry v. Kunz* (8th Cir. 1989) 878 F. 2d 1056, 1060; *Haskell v. Kaman Corp.* (2d Cir. 1984) 743 F. 2d 113, 119.

IV. PLAINTIFF SHOULD BE GRANTED A CONTINUANCE OF THIS HEARING UNTIL SUCH TIME AS DEFENDANT HAS RESPONDED TO PLAINTIFF'S DISCOVERY REQUESTS.

As described in the Introduction and shown by the attached declaration, both sides had informally agreed to a short extension of time to respond to discovery. Plaintiff promptly produced all discovery requested. Defendant has still failed to produce, answer, or object to production or

interrogatories or requests for admission. California CCP 437c mandates a continuance of a summary judgment hearing when a good faith showing indicates that a continuance is needed to obtain facts essential to justify opposition to the motion. *O'Laskey v. Sortino* (1990) 224 Cal. App. 3d 241, 251, 273 Cal. Rptr. 674.

CONCLUSION

Based on the above and the supporting exhibits attached to Plaintiff's Opposition to Summary Judgment, Plaintiff prays the Court to deny Defendant's Motion for Summary Judgment or Summary Adjudication, or, in the alternative, to grant only partial Summary Judgment on Plaintiff's disability claim, and allow this case to proceed on Plaintiff's age and retaliation claims. Plaintiff also requests a continuance until such time as Defendant produces and/or objects to Plaintiff's discovery requests, as in the interest of justice.

Respectfully submitted,

ALCALA, MARTINEZ-SENFTNER & VELEZ,

/s/ ANA MARIA HUERTA
DATE: January 8, 1996